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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

November 17, 2016

The Committee on Legal Services met on Thursday, November 17, 2016, at 9:07 a.m. in HCR 0112. The following members were present:

Representative Foote
Representative McCann
Representative Willett
Senator Johnston
Senator Roberts
Senator Steadman

Representative Foote called the meeting to order.

9:08 a.m. – Richard Sweetman, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1 a – Rules of the State Board of Human Services, Department of Human Services, concerning penalties for individuals convicted of fraud in the Low-Income Energy Assistance Program (LEAP) (LLS Docket No. 160136; SOS Tracking No. 2015 00854).

Mr. Sweetman said this morning I bring for your consideration Rule 3.751.56 of the low-income energy assistance program, also known as LEAP. LEAP is a public assistance program that helps qualifying utility customers in the state pay their energy bills. The program collects optional contributions from utility customers and transfers these contributions to a nonprofit organization called energy outreach Colorado which in turn provides assistance payments on behalf

of these qualifying customers back to the utility companies. Rule 3.751.56 of the state board of human services sets forth an administrative penalty for a person who uses fraudulent means to acquire benefits from LEAP. Specifically, the rule states that a person who defrauds LEAP is disqualified from participating in the program for two years following a first offense and permanently after a second or subsequent offense. The problem is that there exists a statute, section 26-1-127 (1), C.R.S., that sets forth a similar disqualification scheme. However, the statutory provision states that a person who fraudulently acquires public assistance is disqualified from participation in any public assistance program for one year for a first offense, two years following a second offense, and permanently following a third or subsequent offense. Because the rule sets forth a contradictory disqualification penalty within LEAP for the same prohibited behavior that is described by the statute there is a clear conflict between the rule and the statute. For this reason we recommend the rule not be continued.

Representative Willett said have you heard any defense to this? Is it arguable that LEAP is not public assistance? Is there any argument that section 26-1-127 (1), C.R.S., doesn't apply to a LEAP fraud? Mr. Sweetman said I have not heard the argument advanced that LEAP isn't a public assistance program. The reason why I address that issue in Addendum A of my memo is because that issue arose during discussions within our Office about it and I anticipated that one of the attorneys on this Committee might ask that question so I prepared that addendum in advance. However, I was in communication in the spring and also in September with an attorney in the Attorney General's office representing the state board of human services and during those communications he advanced an interpretation of the statute whereby the statute merely established a sort of floor for an administrative penalty scheme that would permit an agency such as the state board of human services to promulgate penalties in excess of the statutory terms. We agreed to disagree on that interpretation and that's where we stand. Representative Willett said apart from the argument that it's not public assistance, my concern would be that if we get rid of this new regulation a scofflaw, a fraudulent person, would defraud LEAP and then be charged under section 26-1-127, C.R.S., and a good lawyer would have a defense that that doesn't apply and then they have no sanction. Is there any other defense if we're left just with section 26-1-127, C.R.S., as the sanction and somebody defrauds LEAP that that statute doesn't apply so they wouldn't have any downside risk? Mr. Sweetman said I'm not sure that I understand your question. Are you suggesting that there could be a defense based on the notion that the rule supersedes the statute? Representative Willett said no, what I'm asking is if this Committee does away with the new rule, so it's gone, and subsequently we have scofflaw fraud under LEAP and they're charged under section 26-1-127, C.R.S., which I understand you think covers it, is there any defense by a good

defense lawyer that 26-1-127, C.R.S., doesn't apply to a LEAP fraud other than this one we just talked about, public assistance? Mr. Sweetman said it's hard for me to anticipate a defense of that sort. To the extent that I've addressed one possible angle I guess in my Addendum A you have that, but none occur to me at the moment.

Representative McCann said I may have missed this but the agenda says this is contested so what are the grounds on which the department of human services or the state board of human services is contesting? Representative Foote said we do have someone signed up from the department to testify.

9:15 a.m. – Steve Johnson, Larimer County Commissioner and member of the State Board of Human Services, testified before the Committee. He said I'm not really from the department, I'm a county commissioner in Larimer County and I'm a member of the state board of human services where I've served for six years. Before I was a county commissioner I was in the legislature for 12 years and the reason I tell you that is for a couple reasons. Number one is, having been a veteran of 12 of the rule making bills that you're going through, I understand the process, support the process, it's a very important process and I also support the supremacy, of the legislative branch reviewing the rules of the executive branch to make sure they have statutory authority. I'm here this morning to ask you not to repeal this rule regarding LEAP for a number of reasons. In my presentation I will demonstrate to you that it is in conformance with the statute and happily also it is in conformance with common sense and good public policy for LEAP. The statute says that such disqualification is mandatory and is in addition to any other penalty imposed by law. The statute for this fraudulent act statute, which applies to all public assistance programs, also says vendor payments and LEAP uses that language specifically so I think the statute would apply, but the statute goes on to say in addition to other penalties imposed by law, so the statute contemplates this, as we believe, a floor or a minimum standard. The overwhelming public interest in this statute is twofold. One, it is to protect the taxpayers' investments in these programs and secondly it is to protect the individuals who rightfully are entitled to these benefits so that the benefits are not diverted to individuals fraudulently representing themselves. The other thing that's important with this statute is LEAP is different than the other public assistance programs that this statute contemplates covering. The other programs identify and verify fraud through an administrative determination called an intentional program violation which is done through the administrative staff for the programs. LEAP is different. It takes a criminal prosecution by a district attorney in a court of law to find somebody guilty of fraud. That's a much more rigorous process. We felt that the three time disqualification for other programs is appropriate for other assistance programs that might go through an administrative decision, but it's a much

higher standard, a much more rigorous standard, to get somebody through a district attorney to file charges against somebody. We felt it was not in the legislature's intent, is not in the public's best interest, to allow somebody to criminally be proven by a court of law three times of fraudulently defrauding LEAP before we disqualify that person. The other thing about this statute is that it covers a number of other assistance programs including the food assistance programs and the Colorado Works TANF program as well. Both of those programs have other penalties, for example using food coupons or food assistance to purchase controlled substances; those have higher penalties that are prescribed. Now those are spelled out in the statutes for those programs. However, at the front of the handout I gave you it has Colorado Works highlighted and that is the front page of the Colorado Works regulations in the Colorado Code of Regulations and then on the back of that page are the penalties for disqualified or excluded persons under the Colorado Works program. You can see in R 1, individuals convicted by a court whose disqualification was obtained through an intentional program violation waiver misrepresenting their residence in order to obtain assistance in two states, and this is a situation where somebody is filing in two states trying to claim dual benefits at the same time, shall have their Colorado Works assistance denied for 10 years. This was an additional penalty prescribed by law, in this case rule, and as I read through the Colorado Works statute which is section 26-2-701, C.R.S, and following this penalty is not spelled out in addition to the three-tiered penalty. My point with that is the Office has allowed, in the past, an interpretation of this statute which allowed the state board of human services to impose penalties in addition to what we believe is the floor penalty prescribed in section 26-1-127, C.R.S.

Finally, why this makes common sense and why this is good policy is that obviously it's the intent of the legislature to protect the taxpayer's resources, it's the intent of the legislature to protect the people who are legitimately entitled to these program's benefits to receive those benefits, and as a legislator and as a commissioner I would never want to have to explain why I allowed somebody to criminally defraud the entitlement programs of the state of Colorado three times before I removed them from eligibility in LEAP. For those reasons, for a past reading of the statutes, counsel is asking you to overturn past practices of interpreting this statute with other disqualifications as imposed by law and counsel is asking you to change our rule from two criminal convictions to allow somebody to be criminally defrauding the program three times. I don't think that's the intent of the legislature, I don't think that's the intent of the statute, and I don't think it's in the best interest of the taxpayers or the people who are entitled to these benefits, so on behalf of the state board of human services I would respectfully ask you to not repeal this rule.

Representative Foote said before I open it up for questions I guess what kept going through my mind during your presentation is just that we have a pretty narrow focus here, we're just seeing whether or not the rule fits within the statute, and so obviously the policy discussion or the policy arguments that you make are fine policy arguments, but what keeps going through my mind is how does this rule not conflict with the statute? If you could maybe just address that it might help me understand what your position is. Mr. Johnson said we believe the rule sets the floor. The intent of the rule is to protect the program and protect the taxpayers' assets so we believe that this is a floor. It further states in addition to other penalties as prescribed by law and rules, as adopted and affirmed by the legislature, do have the force of law. Secondly, as my handout shows you in the Colorado Works program, the state board of human services has imposed additional penalties to this floor penalty in the statute in question. We believe past practice has allowed exactly what we have done in this case. Representative Foote said I'm just looking at the memo so maybe I should pull out the statutes and kind of see some of the context, but is there specific language you're pointing to in saying that the language that says one year for a first offense, two years for a second offense, and permanently for a third or subsequent offense is a floor rather than just prescriptive language as to what should happen if there's fraud that's found. Mr. Johnson said it's not spelled out that explicitly. Representative Foote said okay.

Senator Steadman said I think I agree with Representative Foote that your policy arguments are probably appealing, but it's not really the role of this Committee to consider what the right policy is. We're very much more hung up on procedure. I thought one, I don't know that the fact that a similar flaw may exist in the Works rules doesn't save this rule from this process, it just says we may have missed something or there may be more work to do. As to the language of the statute, which is really where we need to tether our analysis, I interpret the "in addition to other penalties" language to not be a grant to the department to increase the penalty but an acknowledgement of the fact that there may be other ways to prosecute this fraud. And indeed you've told us with LEAP in fact it is necessary to have criminal prosecution and conviction before the fraud is established so obviously there's a penalty that comes about from that conviction and I think that is the in addition to other penalties that the statute contemplated. In my mind this is something that probably needs to be fixed in statute and I'm inclined to go along with our staff recommendation as to the analysis of the procedure before us today. Mr. Johnson said I understand that argument and I think it also has merit and should the legislature wish to fix the situation, because I don't believe any legislator would want someone to criminally defraud LEAP three times, if you decided to do that bill I'm sure the state board of human services would support such legislation and would be willing to testify in support of it. I would hope if your decision is to repeal this

rule, exposing LEAP to three fraudulent criminal actions, I would hope that the legislature would address that in statute and I would certainly think the state board of human services would be supportive of that. But I understand your argument.

Representative McCann said Mr. Sweetman what is your response to this rule that was passed apparently regarding the Colorado Works program that allows a stronger penalty than is in the statute? Mr. Sweetman said I alluded earlier to my communications in May and September with an attorney in the Attorney General's office. During those communications this rule and several others were submitted for my consideration and I did look at it. I found that a couple of the rules that were submitted were not relevant to the analysis. This rule and another rule I found relevant, however, I would direct your attention to R 2, that portion of the rule which mirrors the statute. There's a similar rule that exists that was submitted for my consideration in the food assistance program. That rule also creates a 10 year disqualification for a specifically described type of fraudulent behavior in addition to another rule that mirrors the statute. These two rules are distinguishable from the issue at hand because the rule at hand, Rule 3.751.56, doesn't even purport to identify fraudulent behavior that's not described in the statute and punish it separately. The rule that's before you today simply creates a different penalty scheme for exactly the behavior that's described in the statute. It's a different level. Now that the state board of human services has called our Office's attention to these two rules, depending on the outcome of this hearing today, we most likely will turn our attention to a review of public assistance program rules to see if there are additional instances of this and we will conduct a separate analysis as to whether these rules are violative of the statute. It's a separate question as to whether or not these specifically described fraudulent behaviors fit under statutory language or not.

Representative Willett said I guess I have a different reading of this key statutory provision which says such disqualification is mandatory and in addition to any other penalty imposed by law. The only reason a legislature would have put that language in there is if you had a smaller penalty because then that language would say this is mandatory and it's in addition to… so that really says that's where you start, no less penalty than section 26-1-127, C.R.S. It seems to me that's the intent of this language. This is mandatory and it's in addition to anything else. The only way that language even comes into play is if you have a lesser penalty. I don't think that it at all precludes a greater penalty. Am I reading that wrong? Mr. Sweetman said I would respectfully disagree with your interpretation. As Senator Steadman explained and as I addressed directly on page 4 of my memo, the language – any other penalty imposed by law – is not typically read to authorize additional penalties authorized by rule and not by law. Mr. Johnson said I agree with your interpretation. I think the clear intent

of the legislature would be to protect the lawfully eligible individuals of the entitlement program and not to have this read to protect the individual defrauding the program, that you couldn't do anything more severe than that. I do think it's not clear from the reading and I think you can come up with a couple different interpretations of this but I think a common sense reading of this statute is exactly what you have proscribed. That this is minimum we're going to impose.

Representative Foote said just to address Representative Willett's point, the one thing that came to my mind, and I think Mr. Sweetman you talked about this a little bit during your presentation, was the interplay of penalties as announced in section 26-1-127, C.R.S., and also the criminal law. We have a number of fraud statutes that we prosecute under title 18. When I took a look at that language – any other penalty imposed by law – I recognized it as being language similar to recognizing that there could be criminal prosecutions in addition to the penalties ascribed to 26-1-127, C.R.S. Mr. Sweetman, I remember you talked a little bit about that in your presentation, but could you address that if that is in fact a fair reading of any other penalty imposed by law? Mr. Sweetman said yes, I think you largely mirrored what I said. My suggestion in my memo is that that phrase appears to mean that in addition to facing prosecution for criminal theft as is described in the first sentence of the statute and facing the administrative penalty, which is the disqualification described in the last part of the statute, a person who defrauds a public assistance program may also face further criminal prosecution for any of the fraudulent offenses that are described under article 5 of title 18, depending on the circumstances.

Senator Johnston said I would just add that I agree with Mr. Johnson and I think the proposed rule is actually better policy than what is on the books right now. I agree with Senator Steadman and others and Mr. Sweetman that the language of the statute that refers to other penalties imposed by law are just that, other penalties imposed by law, not imposed by regulation, which is that if there are other penalties you can acquire from different statutes that allow different kinds of charges for these crimes you might be eligible for multiple charges for those same actions. I think this probably takes some legislative revisiting so I think Representative Willett and Representative Foote will have to be the ones to run the bill in 2017 to get this fixed. I think Mr. Johnson has a better plan, but I'll be with Mr. Sweetman on this one.

Representative Willett said I like the analysis I gave. It seems to me it's clear that duly authorized Colorado rule or regulation has force and is law. If we're going to go down this road every time we pass something we're going to have the language unless otherwise proscribed by law, rule, regulation, or form. I mean it

kind of gets never ending. I think when the legislature says law it means any lawfully binding rule, regulation, or statute, so that's where I stand.

9:34 a.m.

Hearing no further discussion or testimony, Senator Steadman moved to extend Rule 3.751.56 of the State Board of Human Services and asked for a no vote. Senator Johnston seconded the motion. The motion failed on a vote of 1-5 with Representative Willett voting yes and Senator Johnston, Representative McCann, Senator Roberts, Senator Steadman, and Representative Foote voting no. The rule was not extended.

Senator Steadman said while Mr. Sweetman's still at the table I have a question. A moment ago you said the Office may be prompted by the department of human services' submission of these other rules to re-review them and my question for you is are these in cycle right now for this year's rule review or would you be undertaking an out-of-cycle review to do that. Mr. Sweetman said I don't know and I really don't know how to answer your question. Maybe there's someone here who could answer that question better than I could. Senator Steadman said in that case I'll preempt. I would like to request an out-of-cycle review on those additional rules, this Works one and I think you mentioned another one that you didn't give us much specificity on. I think if we're going to tackle this issue and there may be a need for a legislative solution to put a preferred policy in place let's do it all at once and maybe fix it all at once.

9:35 a.m. – Thomas Morris, Managing Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1 b – Rules of the Director, Division of Oil and Public Safety, Department of Labor and Employment, concerning underground storage tanks and above ground storage tanks (LLS Docket No. 160373; SOS Tracking No. 2016 00307).

Mr. Morris said I have the rules of the director of the division of oil and public safety in the department of labor and employment concerning underground storage tanks and above ground storage tanks. My understanding is that this is uncontested. The director of the division is here if the Committee has any questions. There are three sets of rules that are covered in the memo. All of them relate to incorporation by reference. I will start by referring you to the citation of the incorporation by reference statute that's at the bottom of page 2 and the top of page 3 of my memo. If an agency wants to incorporate outside materials in a rule such as standards adopted by a national organization there are certain hoops that the rule has to go through and those are listed at the top of page 3. The reference, meaning the reference in rule, has to fully identify the

standard by date, it has to identify the address of the agency where the standard is available for public inspection, and the rule has to state that the rule does not include any later amendments. Then it says in addition the rule has to state where copies of the standard are available for a reasonable charge from the agency adopting the rule and where copies are available from the organization originally issuing the standard. Rule 1-7, which is attached as Addendum A, purports to be an exhaustive list of all of the standards that the rules regarding the storage tanks incorporated by reference. If you look at Addendum A there is a quote of that Rule 1-7 of the rules and it simply lists a lot of standards and it says at the very beginning part the following codes, documents, or standards are incorporated by reference which is all well and good. The following sections in the rules, Rule 1-8 and 1-9, purport to comply with some of the other requirements for incorporation by reference such as parties may inspect the referenced incorporated materials by contacting the director and in Rule 1-9, this rule does not include later amendments. The problem here, with this first group of rules, is that there are a lot of instances in the rules where the rules refer to and attempt to incorporate by reference various standards that aren't listed in Rule 1-7. I've listed all of those rules in the footnote at the bottom of page 3 of the memo. They are quoted in full in Addendum B. I just went through the rule and there are all of these standards that are not listed in Rule 1-7 so I complied all of those and put them into Addendum B. Our conclusion and recommendation is that all of those rules that attempt to incorporate by reference standards that aren't listed in Rule 1-7 should not be extended. I will not list all of those rules because there are numerous instances.

If there are no questions on that portion I will move onto the next section of the rules and that is section 2 of the memo on page 4. Rule 1-8 fails to specify where the standards are available for copying and inspection. If you remember when I quoted the statute, section 24-4-103 (12.5)(a)(II), C.R.S., requires that to incorporate a standard by reference the rule must identify the address of the agency where the code or standard or rule is available for public inspection and subsection (12.5)(a)(IV) of that statute says that the rule must state where copies of the standard are available for a reasonable charge not only from the agency adopting the rule but also where copies are available from the organization or association originally issuing the standard. If you look at Rule 1-8 it does not comply with those requirements. It merely says interested parties may inspect the referenced incorporated materials by contacting the director. It doesn't give the director's address, which is what the requirement in statute is, and it doesn't mention anything about where copies are available either from the agency, in this case the director of the division oil and public safety, or from the agency originally issuing the standard. You'll notice there were all kinds of different entities that promulgate these standards and nowhere in the rules is the address of those agencies listed. Because the director failed to promulgate rules that

address the incorporation by reference requirements relating to the address and where copies are available for inspection our recommendation is that Rule 1-8 not be extended.

There is one last category of incorporation by reference and that relates to the requirement that the rules specify that the incorporated materials do not include later updates of the standards and to do that there has to be a particular date associated with each standard. If you look in Addendum A towards the bottom of that first page under the American Petroleum Institute there are two standards, standard 653, tank inspection repair, alteration, and reconstruction, which has no date unlike all of the other ones you see in there and similarly standard 2000, venting atmosphere in low pressure storage tanks, has no date. Since there are no subdivisions within this Rule 1-7 and the policy and practice of this Committee has been to recommend that when we not extend rules we go to the lowest available numbered subdivision and there is nothing lower than Rule 1-7 in this instance, our recommendation is that Rule 1-7 not be extended. I've cited the director's rule-making authority in Addendum C. Nothing there helps the director in terms of not complying with the statutory requirements for incorporation by reference. I have a very long recommendation for all of these rules. They're all listed either in Addendum A or Addendum B and they are listed on page 5 of the memo. Our recommendation is that they not be extended.

Senator Steadman said this seems like a pretty straightforward case of incorporation by reference problems which this Committee sees on a somewhat regular basis unfortunately. It's kind of like three strikes and they're out. There's not just one place it's running afoul, it's several.

9:44 a.m.

Hearing no further discussion or testimony, Senator Steadman moved to extend the definitions of "Fire resistant tank" and "Protected tank" in Rule 1-5 and Rules 2-1-1 (d) (2) (A); 2-1-1 (d) (2) (B); 2-1-1 (d) (2) (D); 2-2-1 (a) (1), including Note (A) and (B); 2-2-1 (a) (2) (iv) Note; 2-2-1 (a) (2) (iv) (A), (B), (C), and (D); 2-2-1 (a) (3) Note; 2-2-1 (a) (3) (A), (B), (C), and (D); 2-2-1 (b) (1) Note; 2-2-1 (b) (1) (A) and (B); 2-2-1 (b) (2) (iv) Note; 2-2-1 (b) (2) (iv) (A), (B), (C), (D), and (E); 2-3-4-1 (a) (2) Note; 2-3-6-1 (c) Note; 2-5-2 (d); 2-5-3 (b) (1) (A); 2-5-3 (b) (1) (C); 2-5-3 (b) (1) (D); 2-5-3 (d) (1) (v); 2-5-3 (d) (2) (iii); 3-2-1 (a) (1) (iii); 3-2-1 (c) (2) (i); 3-2-1 (d) (2); 3-2-1 (i) (4); 3-2-2-1 (c) and Table 1; 3-2-2-2 (d) (1) (i) and Table 4; 3-2-2-5 (f); 3-2-3 (c) (1); 3-2-3 (c) (3); 3-2-3 (c) (4); 3-3-1 (d) (6) and to extend Rule 1-8 and Rule 1-7 of the Director of the Division of Oil and Public Safety and asked for a no vote. Representative Foote seconded the motion. The motion failed on a vote of 0-6 with Senator Johnston, Representative McCann,

Senator Roberts, Senator Steadman, Representative Willett, and Representative Foote voting no. The rule was not extended.

9:49 a.m. – Thomas Morris addressed agenda item 1 c – Rules of the Water Quality Control Commission, Department of Public Health and Environment, concerning the Colorado discharge permit system, 5 CCR 1002-61 (LLS Docket No. 160425; SOS Tracking No. 2016 00302).

Mr. Morris said my understanding is that this is uncontested. There used to be a single cash fund where all of these water quality fees used to go. Last year the legislature passed a bill to change that and created a lot of different funds that each various sector of the regulated community would have their fees be credited to. The Water Quality Control Commission (commission) adopted a rule to try to track that but they didn't quite get all of them into this particular rule. I will quote the appropriate section of the statute that created the particular fund that is at issue here. The statute is quoted on page 2 of the memo, it's section 25-8-502 (1.1), C.R.S., and it says "for each regulated activity listed in this subsection (1.1) the division may assess an annual permit fee" and then "all such fees must be in accordance with the following schedules" and then subsection (1.1)(a) says "the animal agriculture sector includes annual fee schedules as follows" and then it lays out a lot of different fees for different types of activities. Then on page 3 of the memo towards the middle there is another subsection of this statute that creates the fund, the animal feeding operations fund, which consists of all the fees collected for regulated activities associated with the animal agriculture sector in subsection (1.1)(a) as well as all fees collected for services provided by the division associated with the animal agriculture sector in subsection (1.3). The division then transmits those fees to the state treasurer who credits them to the animal feeding operations fund. Now the commission adopted a rule to control how the various fees are credited to the various funds. That rule, Rule 61.15 (c), is on page 3 and says all fees collected by the division shall be credited to the appropriate sector funds and then it lists six different funds but does not list the animal feeding operations fund. While the commission has a lot of specific rule-making authority and broad general rule-making authority it does not have the authority to direct the state treasurer to credit fees to funds in contravention of how the statute specifies that those fees should be credited. Because Rule 61.15 (c) conflicts with the statute by purporting to credit these particular fees to a fund other than the one specified in the statute our recommendation is that the rule should not be extended.

9:53 a.m.

Hearing no further discussion or testimony, Representative McCann moved to extend Rule 61.15 (c) of the Water Quality Control Commission and asked for a no vote. Representative Willett seconded the motion.

9:54 a.m.

The Committee recessed.

10:02 a.m.

The Committee returned from recess.

Hearing no further discussion or testimony the members were polled and the motion failed on a vote of 0-6 with Senator Johnston, Representative McCann, Senator Roberts, Senator Steadman, Representative Willett, and Representative Foote voting no. The rule was not extended.

10:03 a.m. – Debbie Haskins, Assistant Director, Office of Legislative Legal Services, addressed agenda item 2 – Consideration of Adoption of a Revised Retention of Records Policy for Legislative Member Files.

Ms. Haskins said at the September 29 meeting the Committee took a field trip down to the subbasement to see where the member files are stored. Members of the Committee looked at their own member files from the 2015 legislative session and our Office presented recommendations to the Committee on what to do with the legislative member files, but action on the recommendations was laid over to this meeting. We are asking the Committee today to approve a new policy regarding the retention of records and to recommend that the Executive Committee make changes to the retention of records policy that governs how the Office maintains member files and other records. In the interest of time I am not going to repeat the presentation that I made at the last meeting, but I would like to go over a few key points that we discussed at the last meeting and then we can talk about the next steps. Due to lack of space in the subbasement, the Office started transferring member files to State Archives many years ago. The conditions in the subbasement where the Office's files are kept are less than ideal. The files are not safe from water damage or mud or bugs and dust, as I think you saw when you went on the field trip. We are running out of space in the subbasement. We have space for only eight years of the member files. The member files consist of bill requests, drafts of bills, emails, research materials, handwritten notes, and amendments. Most of these consist of pages and pages of edited notes on bill drafts. For purposes of ascertaining legislative intent

those notes only apply to one legislator and do not represent what a legislative committee or a legislative body intended. We do not believe that there is much historical value to these files. Under the Colorado Open Records Act (CORA) documents relating to the drafting of bills or amendments prior to introduction are defined as work product; they cannot be released to the public without permission from a current or former legislator. In 1998, the Office started asking legislators to sign a work product waiver form when they were leaving office and many legislators do not return the form and obtaining permission is difficult. Under current Office practices, if a member is deceased the Office redacts any personal notes or private communications in those member files before allowing access to the files. Based on our research it is arguable that the work product privilege does survive a member's death, but if the person is deceased there is no one that can exercise that privilege. Under the existing retention of records policy the Office is required right now to keep those member files indefinitely. The reality is the Office and State Archives are storing records for little practical reason. Since the records are all confidential work product they are protected under CORA and they should never be released without permission. But as I said, obtaining that permission is often difficult or impossible.

It is our recommendation that the Office not keep storing these records in perpetuity. We have prepared a chart, which was in your materials, and it summarizes the Office's recommendations regarding the legislative member files. The records are divided into different categories based on when they were created. We do have records that have been transferred over to State Archives dating back to 1931 through 1997 and those would be considered privileged work product and our recommendation is that we would work with State Archives to destroy those based on a retention schedule. The next category are records that also have been transferred over to State Archives from 1998 through 2008 with the exception that the 2006 member files were never transferred over there because that was the year that we had really difficult problems with flooding and bugs and those records are in very horrible shape so they have not been moved over to State Archives. Again, these are privileged work product unless they have been waived in writing through these waiver forms. We started doing that in 1998 but we do not have waiver forms for every legislator for whom files were created. We are recommending that we would work with State Archives to destroy those based on a retention schedule. Those you can kind of maybe think of in your mind as the old records that have been transferred over to State Archives. The second category is the records that are down in the subbasement, that is 2009 through 2016 and the 2006 member files. Those are in the subbasement and they are privileged work product unless we have received a waiver in writing from the legislator. The Office's recommendation is that we would stop sending files to State Archives, that we would retain the files only in

the capitol subbasement and implement an eight year retention schedule. At the end of a file year's eight year retention, that file year's records would be destroyed. The oldest year would be destroyed first and then it's kind of year in year out. Then we are recommending that the Office discontinue the practice of asking legislators who are leaving the general assembly for a blanket waiver of the work product privilege with respect to their member files. If we did get a request for access to a legislator's member files then our practice right now, and we could continue to do this, would be to ask the person to contact that legislator for specific permission for the file to be reviewed. The fourth part of our recommendation is that we would no longer use the blanket waiver forms that we have on file and that any new requests for access to legislator's files that are in the subbasement would require a case by case specific waiver from that legislator. The next category of the records would be the member files that the Office would be creating starting with the 2017 session. Again those are considered privileged work product unless they're waived by the legislator. Our recommendation is that the Office would not send those files to State Archives, that we would take them down to the subbasement and once their eight years is up they would be destroyed at that time, and if there are requests for access to a member's file or something in the member's file that would be handled on a case by case basis. I just want to clarify that when we talk about destroying the records what we're talking about is shredding them and we have looked at what the cost to do that would be and it is something that we feel we can absorb within our budget. That's kind of a summary of the recommendations and the other handouts that we gave you with the packet were Addendum F and G from the memo that was handed out at the last meeting. The retention of records policy was adopted by the Executive Committee in 1993. Addendum F shows you the changes that we are recommending to policy and shows you how it would be changed along with changes to how other types of records that are covered in this retention of records policy are treated. Many of the things that are in the policy are now no longer our current practice or the technology has changed, and so we recommend that those be updated at this time as well. Addendum F shows the changes assuming that the Committee agrees with the Office's recommendations and then Addendum G shows you the clean copy version of those changes to the retention of records policy. I'm sure you have questions. The recommended action that we're recommending is that the Committee, if you believe these changes should be made, would forward this to the Executive Committee via a letter signed by the chair of this Committee requesting that the Executive Committee make these changes to the retention of records policy.

Representative Willett said I apologize, I had to leave the last meeting when you were just starting you presentation, but I have heard a lot of this and I apologize if you've already gone over this but the first question is, under CORA these are

public records when created but they are cloaked by work product by law so they are protected from an open records request but then if a legislative member makes a waiver then the public can get access? That's my first understanding. That doesn't really answer the destruction question. It sounds like if they are protected by work product and it's not been waived by the legislator it seems to me your conclusion is we're free to destroy them. If there is a waiver does that mean we can't destroy them? Are they somehow the public's property and we can't destroy them without public's permission? So that's my first question and I have a couple follow-ups. Ms. Haskins said I had not anticipated the question that you just asked me Representative Willett. I think our feeling was that the records could be destroyed, but that's an interesting question.

10:16 a.m. – Dan Cartin, Director, Office of Legislative Legal Services, testified before the Committee. He said I think what Ms. Haskins said is accurate. I think at this point we had included any of the member files that we had received a waiver for with member files that we had not received a waiver for for destruction purposes. The questions of whether or not that waiver does make them open records and raises an issue relative to the destruction of those, that particular category, is a good question and probably one option or solution would be, practically I suspect this could be done if it was the direction of the Committee, to segregate those member files that we've received a waiver for and perhaps come back with another recommendation for those. I know I'm not answering your question directly. If there's a way to get back in contact with some of those members I don't know that either but I think we need to look at that a little bit, that category. Good question. I think we'll have to take a look at it.

Representative Willett said really you predicted my follow-up question. I've never really understood, and I know it's a little gray, what the relationship is between a legislator and the Office. There's kind of an attorney-client relationship there so in addition to work product there might be a confidentiality privilege and before we destroy records for which we've not received a waiver do we have any duty, like one does when they close down a law practice, to send out notice to the last known address of the client saying we're going to destroy your files? Maybe we don't have that relationship. Maybe that's not a concern. But before we destroy a whole bunch of either client records or public records I just want to be a little bit careful. Mr. Cartin said again that is a question that we had not anticipated and basically not an issue we were prepared to address. I guess to the extent that that is something the Committee would like us to look at further we can go slow and come back either to this Committee in December or to the new Committee next year for those two specific questions. I'd also defer to Ms. Haskins on that, but I don't know how difficult that would be, how practical that would be. I think there are

always issues with tracking down former members' addresses on the infrequent instances when a member of the public goes to State Archives and wants to see one of these former member files.

Representative Foote said they're interesting questions obviously. I hadn't anticipated those questions either and I guess, for whatever it's worth, worth considering perhaps. I'm not sure, I wasn't here the last time so I don't know if this was discussed the last time, but if there's a real hurry or deadline that we have with getting this done, but to the extent that there isn't perhaps at least working through those questions might be valuable for the next meeting.

Senator Roberts said my understanding is in cases where a court is trying to determine legislative intent that the files, the sponsor and draft notes, are of marginal, if any, use. That discerning a 100 members' legislative intent based off of perhaps committee or floor discussion, but that we as the bill originator let go the moment it gets entered into the process. I think we'd all like to think that everything we touched here was worthy of museum quality care for ever and ever, but frankly I guess I wanted to confirm my thought that there is really little value, including if a statute is ever challenged in court, as to what we individually thought when we brought the bill forward. Ms. Haskins said yes, I would agree with you on that. I think under the best evidence rule that the courts would look at they would not look at the notes prior to introduction as evidence of the legislative intent. They're going to look at what was stated in the record in a committee hearing, on the floor debate, and they're not going to look at this kind of material. Senator Roberts said it seems like a massive amount of paper with very little value besides collecting dust and bugs. I almost hate to see you shred things because that is resource intensive so I was going to suggest a bonfire and I even had a name, bonfire of the vanities might work. As to the signing off, I'm just wondering as to Representative Willett's point, I know as an attorney in practice who closed the practice once I came here I had in my fee agreements with clients a certain period of time after which, and I think it was seven years, that I would destroy the records which I have done. Would it not be possible at the beginning when new legislators come in to have some sort of consent form that lays out the policy, whatever the policy is that gets adopted, with a paragraph in there that says we are going to destroy this so you're not chasing us down as we leave and then move and whatever, but so that legislators are informed at the very beginning. Maybe if you want to do an annual reminder or something. I would think that to give you protection from anybody saying I didn't know that, having it in writing and signed off on by the legislators that this is the standard policy would work. It's not like these are our notes. I mean I am a bit of a gatherer of papers myself so I have my notes from when I worked on a bill if I still have kept them. I just think you ought to clean out your backlog. Ms. Haskins said I couldn't agree with you more. I do think

that we could develop some kind of consent form. The form that we have been using with the waiver form, I think it's coming at the wrong time. Legislators are leaving office and we're asking them to sign a form about records they didn't create; they don't know what's in them. This is the first time, at the last meeting and today a couple of you looked at your files before the meeting, but this is the first time that I'm aware of that any legislator has actually looked at a member file and actually knows what's in them. There are pages and pages and pages of words and it's drafts; it's edits. The value of this and the effort and resources and the space that is being taken up by these records, it's a little staggering. Senator Roberts said it is a nice walk down memory lane, in some cases not as nice a walk down memory lane, but I guess I see this as your product to do with as you wish as you have notified us to do. As an attorney holding onto client files, I have considered the work product mine. Obviously my client has an interest in it, but it's not my client's work, it's my work product and I think in terms of the ownership piece it really belongs with the Office. I have no discomfort with you having a set policy and for practical reasons as well I don't see any value to this so I think you ought to keep moving on developing the policy. I would get the legislators when they begin here and try and get their sign off at the front end and if anybody wants it, if you want to create an exception to the rule, they can, until such time that you choose to say okay we've moved forward and disposed of your files. But you certainly have my permission to take every piece of this related to me and put it in the bonfire or the shredder or whichever you care to.

Representative Foote said I was actually one that looked at my file for the first time this morning as well before coming in because I was just curious about what was in it and I would concur with Senator Roberts, not necessarily about the bonfire, but that it seems to have not too much value. I mean it's just these drafts, really just train of thought, that didn't end up getting introduced for the most part. That was just my impression about what was in the file and clearly I had not been that curious for the last four years before today and I guess I can see why after looking through it. Not that it's bad stuff, it just seems like it's not that valuable, particularly for legislative intent.

Senator Steadman said I want to concur with both of the previous speakers. When we first started this discussion this spring or last winter I think I was the one that started going down the path of these documents must have some sort of historical value and there must be some reason to preserve them or send them to the State Archives and having had the chance to look at my file and see what's really in there, or at least one of them, I have boxes and boxes of them, I don't think they're of value to anybody and probably should go to shredder. I would like to see this Committee resolve this issue before the end of the year just because as I noted, we've been talking about this sporadically throughout

the year and I really don't think it's fair to the Committee that gets seated in January to have to make them start all over. But I'm not sure where that leaves us today because I think Representative Willett raised some good questions and I'd kind of like to have you think about that and maybe come back to us. I'm wondering, Mr. Chairman, if this is something that should go on our December agenda. That gives the staff some time to do a little more work for us and bring us the complete package and procedures and if it's part of an onboarding process for new legislators and orientation I think that's a great idea, it is where it belongs. If we could consider it all at once in December, that would be my preference.

Representative Foote said Senator Steadman that actually crossed my mind as well because I do think Representative Willett brought up a couple of points that at least there could be some discussion of and analysis of and noted that we had another meeting on the agenda before the end of the year so we could resolve it at that point and time after hearing back about those questions.

Senator Johnston said I just agree with the other comments. I'd add one bit of context because I have lived through in the last year a former piece of legislation that has been the source of a lawsuit which has gone up to the Supreme Court now twice. Senate Bill 191 is the source of two different lawsuits to the Supreme Court, so I've gone through this entire process of lawyers' questions of legislator's intent and I think I was surprised at how little information they actually wanted from us about that question and when they did as far as they went is exactly what Senator Roberts said which was maybe debate at the microphone, maybe amendments introduced and debated, but there were no questions about what was in your early draft ideas four months before the bill got introduced. What they wanted to know was what was voted on, what were the debates about, and the final amendments that were put into place. Having lived through one cycle of what we might be envisioning we're keeping these files for, it seems like I've never seen an instance where these were the questions that they had. What they had were about the votes that were cast and the amendments that were put in place and that's all files that we have safely protected so I would agree that it seems reasonable. My only addition might be, I might not poll them on the day that they come in because I think the day that they come in the bonfire, the vanities, might be quite high, that they actually believe Woodward and Bernstein will be calling them to write their biography soon after their term is over. I find we're a little humbler on the way out then we might be on the way in so a slight modification to when you ask when they can destroy their records, but I'll leave that for the Committee.

Representative Willett said that's a good segue to my question and I don't want to over-lawyer this but you have referenced some people from the public that

have done this in the past. What, is it political interest, is it biographies, is it family members who want to see a particularly famous member's notes to try to put together a book? What if any practical value are these? Ms. Haskins said we have very little information on why people have asked to see the files. They haven't been open records requests; they don't come in as open records requests. They come in as somebody wants to look at, usually it's a particular file on a bill, and so they're very informal and they come to the Office and then if the record is over at State Archives we have to work with State Archives to get that record. In the last year State Archives said we could no longer go get the file, we have to go over there. That's been one change with State Archives. The number of times is so infrequent that we have not tracked why someone has asked to see the file. We're not aware of someone writing a biography and asking for all the records. We've not had that. I think we don't really know the answer to that question and it does not happen very often.

Mr. Cartin said before we leave just to clarify exactly what we're going to come back to the Committee with. What I heard Representative Willett asked and part of the discussion it seems has been about whether there's any obligation or best practice to reach out to former members who have waived the privilege or whether that waiver, what impact that has on records that are otherwise privileged and not subject to inspection under CORA.

Representative Willett said I think the first question would be for you as legal counsel. Do you have any attorney-client relationship with those members? I get what you're saying, they're your notes primarily, but those reflect communication with a client, if they are a client, and I think you may have some ethical obligations if that's true. I don't even know if it's true, they may not be your client and if they're not your client and if that's clear I think that helps move this out a lot because you probably don't have any obligations of informing clients or having an agreement as we do that allows you to destroy those. If there's no client relationship than I think that helps with that one issue. Then the second question is about the ones where the waiver has been received by you; are those now public records and does that put any limits on destruction? I don't mean to imply that it does but before we go destroying those we ought to at least feel comfortable in doing so. Mr. Cartin said with respect to the first question our Office's position is that we do not maintain an attorney-client relationship with each of the 100 members; our attorney-client relationship is with the institution. The duty of confidentiality as far as documentation, bill drafts, amendments, conversations, and the like is either statutory or more or less what we view as a derivative type of constituent of the organization, not quite privilege, but maybe quasi-privilege, but there's not a straight attorney-client relationship between our Office and each of you. Representative Willett said thank you for that clarification. It would seem then

unless I'm missing something, a departed, not dead, but member of the legislature who's no longer here who may or may not be available or easily found doesn't have any interest in these documents. They were a member of an entity, created something as part of the cog, and you have a relationship with that entity and if that entity decides to destroy its records, the past members and current members probably don't have any interest in that. Mr. Cartin said I won't belabor it but going back to the table, looking at category 2, and to Senator Roberts point, we can look at your questions further that you're positing but the records are generated by our Office, they're not generated by the member, and so any records generated by a legislator are completely independent from the records held by our Office, a different category; if you look at category 2 that's privileged work product. We could look at your question further but I'm not sure that the institutional client that we have or our relationship with the institution impacts the status of those as being privileged work product that is being held by us.

Representative Foote said I guess I'm getting a sense of the Committee here that we want this to be resolved by the end of the year because we don't want to put the new Committee and the staff through going through the same motions again in January. However, there might be a little bit more analysis, a little bit more to be done to the policy before coming back in December and at that point we should be ready to act or not act depending on what the Committee thinks once we hear back from staff in December. Is that a fair way to put it?

Representative McCann said I just have one comment and I was kind of listening to Representative Willett, but if it's really not work product specifically of the legislator I'm not sure having a blanket waiver is even necessary so your policy, your chart says you're just going to destroy them after eight years, which I think is fine. I don't think you need to ask me if you can destroy them. When I'm writing my own notes on my drafts, those I keep in my file so those are my own personal notes. What you're talking about is just all these drafts that we keep getting. When I ask you to do a revision you do a new draft and you send it to me; they're just drafts. I don't think they have personal notes in there. The drafter's notes are in there but not the legislators' notes. Whether or not that's attorney-client I don't know. I just agree with Senator Johnston. If somebody hands me a blanket waiver when I'm just starting and I have no idea what these records are, I'm not going to want to sign that because I don't really know what I'm signing. Maybe with the blanket waiver you don't let us move out of our office until we sign it. You could lock our offices and put that waiver on the door or something because it's crazy to track us all down.

Representative Foote said although when I was looking at my records this morning I did notice some email communications that had been printed out that

came from me to the drafter so to the extent that that could be work product I guess is something that is up for discussion. It seems to be that there's a little bit more than just drafts, there seems to be some communication between the legislator and the drafter as well, maybe not just handwritten notes in the margin like we would do on our bills, but that was my impression. Ms. Haskins said it's a variety. Representative Foote said I guess what we'll do is move on and ask staff to come back and tweak the proposal for the December meeting and we'll make a decision at that point and time.

10:41 a.m. – Thomas Morris addressed agenda item 3 – Consideration of a Bill Draft to amend the Administrative Procedures Act to allow a streamlined process for correcting statutory citations in executive branch agency rules.

Mr. Morris said when this Committee sponsored the legislation that set up the title 12 study process one of the requirements that we were to comply with was to inquire about the potential fiscal impact of doing a recodification. We asked our stakeholders about that during our meetings this summer and some of the feedback that we got was a suggestion to do essentially what this bill does which is to create a process that is somewhat analogous to the existing scrivener's error procedure. Pursuant to that, this isn't completely laid out in the statute, but the way it actually works is the agency asks the Attorney General to write a letter that says there was a slip of the pen between what the agency that adopted the rule intended to do and the piece of paper or the electronic notification that actually went to the Secretary of State and so there was an error there and we want that error corrected. The Secretary of State receives the letter from the Attorney General and notifies our Office of that event, we do see those, and then the Secretary of State simply goes ahead and corrects that error in the official version of the Colorado Code of Regulations. The approach that this bill takes is somewhat similar to that. There are two sections to the bill. The first section amends the definition of rulemaking and specifies that rulemaking does not include a statutory citation correction as authorized in section 2 of the bill. Section 2 of the bill has a couple of different parts. The first one is that the agency may request the Secretary of State to correct a statutory citation if the general assembly has amended a statute in a way that causes the rule's citation to the statute to become incorrect and the second one is that the agency submits to the Secretary of State a written determination by the Attorney General that finds that that condition has been satisfied. In other words, that the rule has a citation, the general assembly amended the statute that made the citation incorrect, and the Attorney General's written determination has to specify every particular instance in the rule that the Secretary of State is supposed to correct. At the top of page 3 in the bill it says "upon receipt of such a request the Secretary of State shall correct the citation" and then the last provision of the bill is a bit of a belt and suspenders by specifying that this type of statutory

citation correction is not rulemaking and does not need to comply with any of the other requirements that apply to normal rulemaking other than the requirements that are specified in bill. That is the bill. There is a safety clause on the bill and the idea there was that agenda item 4 for the Committee this morning has a list of numerous bills that we've been kind of referring to informally as the "low hanging fruit" and one of the ideas of having this bill come first was that if it were enacted early in the session before the "low hanging fruit" bills were filed for fiscal analysis the later bills would have a lower fiscal analysis because the agencies wouldn't have to go through this type of expensive rule-making proceeding in order to correct the statutory citations.

Representative Willett said I see now looking at this again that I may have misinterpreted either language or intent, but here's my concern, members. If an agency references a statute in its rule or form and then the general assembly amends that statute, my first reading of this draft was that that agency could say well they amended that law, that statute, and now our citation is inaccurate, our reference to that is inaccurate because it doesn't quite dovetail therefore we're just going to remove it as opposed to the only thing they can do is change the statute number, a mere change to reflect the new statute. I just got awful hinky with this language from lines 17 to 19 that says it renders the rule citation to the statute inaccurate. I mean that could mean a lot of things to a lot of people. We could have a form that references that statute, that statute is amended, therefore our reference is inaccurate, whatever inaccurate means. Therefore I proposed an amendment that I've circulated to you all that would bring it back to this Committee if the Office looked at an agency's change and said no, that's too far away from just a mere scrivener's error, and this Committee just like we always do needs to look at that if the Office thought it was out of bounds. Now I'm not sure I need that amendment, but maybe we need to change that language a little. If "citation to the statute is inaccurate" is super legalese that just means the actual citation in the terms of the title, section, subsection listing is inaccurate… Is my question clear as to what you're intending to say there? Mr. Morris said I think the idea was that a rule would say something like "pursuant to section 12-21-114…" and then the general assembly recodifies that section out of title 12 or within title 12 to somewhere else, and now that citation is wrong and the agency could correct the citation to the correct citation pursuant to this process as opposed to quoting the language of the statute without actually citing the statute because that would be a different deal. That would not be covered within this bill and I don't think the Attorney General could write a letter that said well they didn't cite the statute but they quoted it and the general assembly changed the substance of the statute as opposed to where it's located. Representative Willett said so that everyone knows my concern, any maybe it's heightened by the fact in the last couple weeks I've had two constituents come to me with forms and with new rules that they think are in violation and that's when we

take out-of-cycle request to review things, that if it's just a politically elected person and an agency that decides that now their form is inaccurate because the statute has been changed by the general assembly or amended and then they therefore change in their form or their rule, that reference to that statute, then the public might not have in that form that reference to that statute anymore. I just find the language to be subject to potential misuse, misinterpretation, and it's not just clearly a scrivener's error kind of language. I don't mean that as any criticism, I just mean it as I don't like situations where bureaucracies and elected officials kind of have that power to change something without going through a process, so rather than go back through the Administrative Procedures Act process we're trying to get away from, my amendment says at least if the Office sees a problem, just like they normally do, they bring it here and we can see if it's fair within the law.

Representative Foote said Representative Willett, just so I'm clear about what your concern is, your concern is either that the language could be interpreted broadly, or too broadly, or is your concern that in the effort to make the citation accurate they in fact mess something up and it continues to be inaccurate, or both?

Representative Willett said both. Mr. Morris said I don't know if changing the word on line 17 of page 2 from "amended the statute" to say something like "relocated the statute" or "renumbered the statute" gives you any comfort? Because you typically when you would amend a statute you're changing the words in the statute and we're really talking about the numbers, how it's codified, where it's codified. Representative Willett said I think that would help and then you might want to follow-up on page 3, line 2, to say, as opposed to citation that's to be corrected, to reflect the remuneration or to dovetail with your first language so that they don't have carte blanche, they simply are limited to changing the statute to the right number. Mr. Morris said sorry, the reference was on page 3, line 1? Representative Willett said lines 1 and 2, but mostly at the end of 2. Mr. Morris said another option would be to include a definition of what citation means, it's the reference within the C.R.S. to title, article, section, etc.

Representative Foote said personally I don't have any issue with trying to tighten up the language as much as possible. That's what we're trying to do. That's what we do here. Although I don't know Representative Willett if your amendment that you gave us beforehand really does everything you're looking to do. Maybe just the tightening of the language actually would do that.

Representative Willett said agreed, that would be my preference looking at it a little more carefully. But if we're going to stick with the current language then I wanted the backstop of this Committee.

Senator Steadman said I agree that on page 2, line 17, where it says the general assembly has amended the statute that we could tighten it up. I think relocated is probably the right word in lieu of amended, but at the top of page 3 I'm pretty clear in my mind what citation is. I'm not opposed to adding a definition if it's necessary, I just don't know that it is.

10:53 a.m.

Senator Steadman moved a conceptual amendment to LLS 17-0223.03, to amend the bill on page 2, line 17, by striking the word "amended" and substituting the word "relocated". Representative McCann said what about adding in "or renumbered"? Or does relocate automatically cover renumbering? Mr. Morris said I think it gets to somewhat of a question of semantics. There are going to be some particular situations, unlikely, but possible, where an article or a provision of law doesn't change the title, the article, or the section but its subsection and everything below that changes. I think that would be a pretty rare coincidence, that we would recodify this entire title and an entire section stays exactly where it is and the only reason that this becomes inaccurate is because of something at the subsection level. I think in virtually every instance it's going to be a different section number, different article, mostly a different article. Of course if we're moving it out of title 12 it's going to be a different title as well. Representative Foote said I guess it seems to me that renumbered would be encompassed within relocated. Senator Steadman said I would just note for the Committee that relocated is something of a term of art and it is the word that's used in the amending clauses and we've got a whole stack of bills here that relocate lots of things and so I think that is our term that we use as a term of art. Representative Willett seconded the motion. Hearing no further discussion or testimony the motion passed on a vote of 6-0 with Senator Johnston, Representative McCann, Senator Roberts, Senator Steadman, Representative Willett, and Representative Foote voting yes.

Representative Foote said at this point we have the draft that was amended by our conceptual amendment.

10:56 a.m.

Senator Steadman moved that the Committee sponsor LLS 17-0223.03, as amended, as a bill from the Committee on Legal Services. Senator Roberts said since a number of members on the Committee, both present and absent today,

will not be here in the 2017 session does that affect this at all? I mean you can put it forward but who's going to be listed as bill sponsors or should it wait until January. Representative Foote said that is the next question. That's actually a question that I had about the next agenda item. When I was thinking through it I was just assuming it would have to be someone that's here which is pretty much Representative Willett and myself I think at this point. Senator Roberts said the problem with putting it forward as a committee bill with only two House members present today is if it's a committee bill it has a sense of Committee buy-in and you don't have your Committee today that you'll have in January. I don't care, but historically to me a committee bill means you've had the full hearing and you're actually going to have to introduce this concept which we've been working on for quite some time but you're going to have to introduce it for the first time to a number of folks coming on, whoever they are. Senator Steadman said I think Senator Roberts has a good point and I'd like to offer maybe a path forward for us. Given that the December meeting will likely have quite a few rule review items on the agenda, that's typical for our December meeting, it's usually all day, I'd like to do as much work as we can today. Perhaps if we went ahead and finalized Committee action on the bills but left sponsorship pending until the December meeting and hopefully a few more folks might be here. Representative Kagan was just elected to the Senate and Senator Scott's still going to be around so we've got a couple Senators that could help you to carry all these bills next year and hopefully they'd be here in December and we could make quick work of divvying up sponsorship and conforming co-sponsors and everything at our December meeting. But we wouldn't have to vote again and discuss all that just because of other business in December. Senator Roberts said I'm not sure Senator Scott will be on the Committee. We do have Senator-elect Gardner who's familiar with this Committee and might likely be coming on. I'm a little uncomfortable putting it forward on a vote today since I won't be here and calling it a committee bill. I feel like maybe staff could do outreach, and we all could push incoming leadership to get our incoming expected members to be here in December to get familiar. It's just this is a pretty big project and I think it will take some explaining and comforting and that's all the more reason it would be nice to have people come to the December meeting whether they're actually sitting Committee members or not. Maybe in December we can get it through, but I think I feel pretty strongly that if it's called a committee bill it needs to have the Committee members who will be here to support it in the upcoming session because it's a little like the seniors leaving but with their priorities in place for the next class to pick up. I hope they will continue with this but I think we have to leave it to them to decide that this is their priority, not just ours. Representative Willett said I tend to agree with Senator Roberts and I also wanted to ask, it seems to me I saw an email floating around about committee assignments and the Speaker has to do something by a certain date. When are

the new committees set? Will they be set before this Committee's next meeting? Ms. Haskins said we might not know who the members of the Committee are going to be at that point. The Committee has to have an organizational meeting within 10 days after the start of the session. I'm not remembering the statute exactly. Typically, we don't know at the December meeting in an election year who the next incoming members are going to be, but the December meeting is the 19th so perhaps we can have some conversations with leadership. Senator Roberts said I think we should help you with leadership in stressing the urgency to get that going because we have some big things on deck, but they need to get educated and supportive. Representative Willett said I just found my email and this may or may not be accurate, but it comes from my leadership that according to legislative council all assignments must be completed by December 1st. Senator Steadman said I have a couple things. The membership of this Committee requires approval by the bodies and so no one is really a member of this Committee until after the next session has started and the resolution announcing the appointments has been adopted by the House and Senate. I'm all for encouraging them, if we know who the leaders' intend to appoint to the Committee to start doing their homework ahead of time and coming to our meetings. They wouldn't necessarily be entitled to per diem if they're not yet an official member of the Committee and so that may not be a reasonable expectation a week before the holidays. And as much as I appreciate the point that Senator Roberts was making about the need to get the next iteration of this Committee up to speed with this project, this happens every two years where this Committee does all this work and prepares a Rule Review Bill, at minimum we do a Rule Review Bill every year, that's been voted on by the prior Committee and newly elected, newly seated Committee members have to carry that through the process in the next session. Often the issues in the Rule Review Bill that we've parsed through over the course of many meetings are far more complex than the issues that are presented in this whole stack of bills that we've got here. This is pure, nonsubstantive recodification. I don't think it's terribly difficult to get up to speed on or unreasonable for the old Committee to vote these out as committee bills and expect the new Committee to carry it because we do that every year with the Rule Review Bill; it's even often got a lot more landmines in it in some years. I don't have that continuity or carryover concerns to the extent that Senator Roberts expressed. I think it's our normal process that the outgoing leaves gifts for the incoming. Senator Roberts said well I remember disagreeing with some of the gifts that we gave at the end of one year onto the next so maybe I'm a little more sensitive about assumptions made as to what the committee bill is. I appreciate both points and the argument I can see for advancing is that to some degree it lets this group say we see it as a simple relocation bill, but I think from the start we've said this could easily turn into a hornet's nest for those who want to make mischief with the opportunity. That's why I think I've got this heightened concern that something called a committee

bill actually has knowledge and support from the Committee members at that time. The other thing is the SMART act hearings are all occurring in January and people are coming in even regardless of the holidays so I don't think it's a foreign concept that incoming Committee members would have a little extra to do up front. I'm not going to fall on my sword over this one. I just think it's a little more complicated than the average Rule Review Bill that we pass on. Representative Foote said for whatever it's worth my thought in this is it may be a different analysis or thought pattern if we're talking about a substantive bill. In this case it seems like we're talking very much about a procedural issue, a procedural bill, to then make way for a possible recodification of title 12. For this particular bill I guess it seems to me I don't have too much of an issue leaving it as a gift to the next committee and voting on it here although I think this has been a good discussion and I appreciate the concerns on both sides. It seems though that if we are to go forward with the title 12 recodification we would need to go forward with this first. Time is an issue when we're talking about trying to get this through its committee of reference as well as getting it voted on the floor before we even go forward with the title 12 recodification. Again for whatever it's worth, I would fall on the side of us having this as a committee bill at this point for the reasons that I indicated. I may not feel that way about a different bill, but this one I would feel that way about. Senator Roberts said I'm not going to fall on my sword on it and I would support a motion to make it a committee bill, but I do think it shouldn't be a shock if the next Committee decides to undo our Committee's perception of it and I would encourage new members to immerse themselves in this to make sure they're as comfortable as we are. Representative Foote said I think that makes a lot of sense actually. Senator Steadman stated the motion again. Senator Johnston seconded the motion. Hearing no further discussion or testimony the motion passed on a vote of 6-0 with Senator Johnston, Representative McCann, Senator Roberts, Senator Steadman, Representative Willett, and Representative Foote voting yes.

11:10 a.m. – Christy Chase, Managing Senior Attorney, Office of Legislative Legal Services, and Thomas Morris addressed agenda item 4 – Consideration of Title 12 Recodification Bills that Relocate Certain Articles from Title 12 to other Titles in the Colorado Revised Statutes.

Ms. Chase said hopefully you've received your lovely packet of bills that many people in our Office helped us prepare. Again these are bills to relocate 20 different articles that are currently housed in title 12 to other locations. I will let you know that after we drafted all the bills that you approved for us at your last meeting we did get some feedback, particularly from the judicial department and others, with regard to relocating the article governing attorneys at law. There's some concern that attorneys at law shouldn't actually even be in the

C.R.S. since they are under the umbrella of the Supreme Court so we pulled that draft off the table and we're going to continue to work on that and come back to you at some point with a recommendation either to repeal it or put it somewhere else. Anything that we were getting some angst about from the stakeholders we tried to pull off the table and these again as Mr. Morris described are the simple relocations, the "low hanging fruit" provisions or measures. Just to give you a heads up, there was another one too, and I believe Mr. Nicolleti from the department of public health and environment (CDPHE) is here to talk to you about it, with regard to article 30 which is the cancer cure control article that we were recommending relocating to title 25 under the offices of CDPHE. We've gotten a little feedback from them about a federal preemption that may be an issue; they may want that repealed as well, so we didn't remove it from the bill that's listed as number 12 on the list under CDPHE, 17-0241, but we will continue to work with them to see if we need to remove that article from the bill. Generally speaking, when we drafted these bills we got together as a group and came up with some guiding principles about how we wanted to draft them and be consistent across the board. Hopefully you will notice that all the bills have a very similar title. We used the same format for the bill titles, the bill topics, and the bill summaries for consistency. We somehow managed to get a group of about 13 attorneys to agree on the things in the statute that we would update like gender neutral language and changing such to the. It's a very limited list. I can provide the list to you if you'd like but we had two meetings discussing the updates we would make, that we wouldn't make, and the ones that were up to drafter discretion because we really don't want these bills to have any appearance of there being substantive changes in them. We took a really hard line on what kinds of antiquated language we would update and we're really not updating much. You will not see much stricken type in the bills or much new language. Again they are simply moving the articles from title 12 to another location. They all have an act subject to petition clause, so the 90-day petition period would apply for all these bills. We did send all the drafts out to our email subscribers for feedback. That resulted in the elimination of the bill that would have relocated article 5 about attorneys at law. We're in discussions with CDPHE about that article 30. We did not hear any other negative feedback, or in some cases any feedback, on some of the measures. There are 13 bills before you which added together amount to about 480 pages. One of the things that you may want to consider is whether you want 13 separate measures or do you want a single bill. That would probably be about, after consolidating, I rounded up half pages or partial pages, 470 pages or so. If we were to do that, and for any of the bills if you approve introduction of them, we would like your permission to make any technical changes that we might come across as we're doing another look at the drafts. As Mr. Morris mentioned, we're hoping that you would not proceed with these bills until after the prior bill that you discussed to amend the Administrative Procedure Act was

further along in the process or hopefully enacted by the general assembly. I think that's all I have to say about the relocation bills and I'm happy to answer any questions.

Senator Steadman said I did find one technical thing in one of the bills, but it's actually that cancer thing in the CDPHE that you say you may end up repealing, but on page 12 of that draft you're relocating what's currently a standalone article to a new standalone article, but you don't have up at the top the article heading as is normally the format. One of the things I was wondering was what is this act called and the title isn't there. So it should say article 48 and whatever the heading is. The larger issue though is should we do this as one bill or 13 bills I don't know that I have a strong preference, but I think I kind of like keeping bills that fit in folders. Maybe if we did do an inch and a half thick bill it would go easier and faster; we could be guaranteed that no one would read it. I kind of like the segments that it's in right now. And actually I do have a question on one of them. In the anatomical gifts and unclaimed human bodies one. That bill has the word "and" in the bill title in a place and manner in which I thought was normally not our style to do that because it starts to look like a second subject. The draft number is LLS 17-0235. It's anatomical gifts and unclaimed bodies and I just want to hear the single subject articulation in that title. Ms. Chase said I don't have a good answer for you since I didn't draft this bill. The drafter isn't currently in the room, but I'll get her to come respond to this. I feel like we had a discussion about that in a meeting internally but I can't remember. I thought we were going to come up with a broader term for that phrase and we can certainly do that. They're both in the same article, those two parts are in the same article, and they're both related to dead human bodies. I think we can tweak that. Senator Steadman said perhaps just referring to it as article 34, the relocation of article 34 from title 12. Mr. Morris said our drafting manual does discourage us from having a blank reference to articles in the C.R.S. because one of the functions of the title is to provide notice and nobody would know what we're talking about.

Representative Willett said help me out here, I've gotten a little lost in this process. This is the "low hanging fruit". Do I understand then that we're going to do this in phases? If this Committee passes muster on this, if we move this through then we wait and maybe some more comes through? Is there a reason we don't wait for everything and then you kind of come to us and say the first subgroup A is the "low hanging fruit" for which we had no opposition, with subgroup B there's a little opposition, and subgroup C has really hot button issues and then we kind of deal with it that way, which would also have the benefit of other members being involved and seeing this whole picture? That's questions a. Question b is, are some of these not "low hanging fruit"? Do I recall that there was some discussion of marijuana titles being moved, which I

had some heartburn on? Is that on the table, off the table? Question c is, and I know Mr. Nicoletti can speak for himself, but when I start hearing stuff like well and then there's this other one and there may be a federal preemption issue so we're going to maybe delete a provision or something, I'm not sure we want to get into those kinds of calls. Why not just move it and if there's some other issue to be deleted or amended, leave that to some other committee, some other legislature? Ms. Chase said if I could take that last question first. That's actually why we left article 30 in that bill as a relocation because we haven't looked into the issue of whether there's federal preemption or not, that's a whole can of worms about whether the feds fully occupy the arena and can we do anything. We're not making that judgement call and that's not what the recodification study is all about. That's why we left it in the bill initially to just relocate it and let CDPHE come forward with if they want a bill or to ask you to amend it out of the bill and repeal it because that is a substantive change as opposed to a relocation which is all we're trying to accomplish. With regard to your first question, we came to you in September with our report and update on how we've been moving along with the study and at that time we asked you for permission to take a phased-in approach for pursuing legislation as part of the whole umbrella of the study based on the feedback or lack of feedback we were receiving on potentially relocating all of these articles out of title 12. Initially, our plan was not to proceed with any legislation in 2017, however, in terms of seeing how much work it's taken from us this interim and how much more it will be next interim we were hoping to take some of that workload off the plate for next year by getting the "low hanging fruit" handled in the 2017 session. If you don't want to pursue that, if you don't want to do it in a phased-in approach, if you want to do everything in 2018 that's your prerogative. We were just asking you to help us manage our workload and you manage your workload.

Senator Steadman said I support the phase-in and clearly the citation correction bill is absolutely step one of this process and then the question is do we take any more steps in 2017. Remember that the rationale for why this is "low hanging fruit" and why this is what I think is a logical step too is that these are the non-DORA regulated articles so that all we're going to leave behind in title 12 after the 2017 session, if everything goes as planned, is all of the articles in professions and occupations that are regulated by DORA. That is a bigger project because one of the things we hope to do is extract from each of those individual practice acts global provisions around registration or discipline or notifications, hearings, appeal rights, all those things that are common across all practice acts, for those to be extracted into a preliminary procedural matters article in the front of the title perhaps, and that's going to take some work and that all can proceed over the next interim. It has absolutely nothing to do with the things regulated by CDPHE. Well, I guess there's some DORA here because

there are financial institution things that are regulated by the division of real estate or security or banking or whatever, but it's not the division of professions and occupations within DORA to drill down more specifically. To me, these two steps make sense for 2017 and I think it will make the remainder of the recodification project, which really is the division of professions and occupations stuff in 2018, something easier for the general assembly to understand and sink their teeth into when these extraneous things have already cleared the deck. I think we should proceed with this this year. Again I think these are some pretty simple, pretty dry bills. I've read through them and found a couple things, but it's purely nonsubstantive recodification.

Representative Foote said I agree with what you said Senator Steadman about the phase-in. I agree with that. I guess the question in my mind that we would probably need to ponder goes back to our discussion on the last agenda item, which is that if we decide to go forward with these as committee bills then would we need to basically pick this back up in January when we have our new Committee because these strike me as being different than the other bill that we just dealt with. I'll just put that our there, but I don't know if there's any discussion or questions or thoughts.

Senator Roberts said being from rural Colorado I can tell you that fireworks is considered a pretty dicey topic, farm products and warehouses too. There are a few in there that knowing the history on what we're doing and knowing that it's really just relocation, I personally think it's one thing but some of the folks that come in on the Committee may need some deeper acquaintance with it. Cemeteries, you'd be amazed how we can fight about cemetery associations and what all, so to the extent people need to get educated that this is only relocation and it is not about substantive change, I would feel better to let them learn that first. I think Senator Steadman makes very good points but I'm thinking a little more futuristic in terms of what are we handing off and I would suggest that if the key was to get the other one done as a committee bill and send that message that this is logistical only then we've done that. But I personally will not be supportive of putting these forward as committee bills until you get the new members here so that they don't blow things up unintentionally. They might blow them up intentionally, but I'd rather it not be because we gave them too much to digest at once.

Representative Foote said there will be time on these if that's how we decide to proceed anyway because it's not like we have to put these through at any particular time other than just through the session. But there will be time to do further discussion about these as the beginning of January or the February meeting as well and still get them through. While we're pondering that I know Mr. Nicoletti is here and he is signed up for testimony on behalf of CDPHE.

11:27 a.m. – Michael Nicoletti, Legislative Liaison, Department of Public Health and Environment, testified before the Committee. He said the main purpose of me being here is just to give that heads up of the issue. Basically we're talking about an article that we've never utilized and the federal preemption issue is part of the discussion, but primarily we're focused on the fact that it's something we wouldn't do. The Federal Drug Administration (FDA) is in charge of vetting drugs or other medical procedures and the act itself says it allows us to investigate drugs, medicines, compounds, or devices held out as of value in the diagnosis, treatment, or cure of cancer but then it expressly exempts any drug being investigated by the FDA as a cure for or an aid in the diagnosis of cancer. It allows us to hold hearings regarding such investigations, order cease and desists, and then pass rules regarding the administration of the article itself and basically considering the FDA's role in all of this we pretty much think that that exemption is always going to be in place. We're never going to step in and do anything like this and we never have. I also should start by saying the communication with staff has been great, we completely understand the very limited scope the Committee is trying to take here, we understand the limited scope that staff is trying to take with this, so really this is just a heads up that maybe this discussion once the bill gets introduced or something could happen. Because even though it is just a relocation we do feel that when you move something from a title that really doesn't typically have much to do with CDPHE specifically directly into our title that it might send an even stronger signal that we might do something that we would never do. We just think it's a little bit misleading and confusing to have it in statute because it's not something that we feel we have real authority over and it's something that's never been utilized. I think that's partially why it took us a little bit of time internally to figure this out because we were digging into the past figuring out if this something that's ever been utilized or relevant and we came back multiple times with no. And knowing that the goal here is to make title 12 make more sense, be cleaner, we would hate to muck up title 25 at the same time with something that we feel is probably unnecessary. It's really old, from 1961, so it's just something that's sat in title 12 and never been used. Again, I'm just here to let the Committee know because we didn't want any surprises if we were to come during session and say hey maybe it just makes sense to get rid of the thing instead of moving it over to our title 25. But we again respect the limited scope you're taking at this time and we're not here for a hard ask today, we just kind of wanted to put that on the radar for the Committee.

Senator Steadman said if and when CDPHE does make a decision, I don't think you're going to come here with your ask. This isn't the right committee for it. If you believe new federal laws have preempted this and that it's something the

CDPHE needs to fix then that needs to be part of the department's legislative agenda. Go get yourself a bill sponsor. This bill title isn't going to help you and this Committee isn't the place for you to find help.

Representative Foote said I am pretty sympathetic to Senator Robert's concern regarding these bills. As to the question of us determining whether to go forward today as a Committee or after the new Committee comes in, I'd like to open it up and see if there are any thoughts regarding that particular point. Ms. Chase said if I could just make a background comment to you. The reason these bills are on your agenda today is your December meeting is hefty with rules and the other reason is for us managing our workload. As you might imagine, December gets really busy with bill drafting so from our perspective we wanted to at least get these drafts drafted and available to you sooner rather than later. But there is no urgency to make any determination on these bills at this time. We can come back to you in January for you to decide whether or not you want to vote on them. We just wanted to manage our workload. Representative Foote said I understand that, absolutely. I'm just thinking, but you've already drafted this and so what other than just finding sponsors and seeing if this is a committee bill would you need to do other than what you've already done? Ms. Chase said well, make the technical correction that Senator Steadman pointed out. We'll look through them again to see what other technical corrections we might need to make, but otherwise they can sit on the backburner until you all are ready to look at them again. Representative Foote said at this point if there's no further discussion about this item, I think we'll just go ahead and table this for now and maybe bring it back up at the next meeting. Certainly we'll bring it back up in the January meeting.

Ms. Chase said if you could indulge me for a minute I have another little update that relates to a question Representative Willett asked that I neglected to respond to about the marijuana code recodification. When we met with you in September we let you know that we were having meetings in October. In addition to those provisions in title 12 that are regulated by the division of professions and occupations, there are also articles that are regulated by the department of revenue that we let you know we were looking at moving to a new title. We had a meeting with the department and other stakeholders in October to discuss those provisions; it's the liquor code, the beer code, the marijuana codes, limited gaming, racing, and lottery among others. At that meeting we also discussed the potential reorganization of the marijuana codes which you all authorized us to continue down that path. Just to let you know, we did get some feedback from the attorneys from the Attorney General's office representing the department that they have some concerns about reorganizing those marijuana codes. We're still working to go down that path and we'll continue talking to them and finding out whether it's a viable thing. We won't

pursue that before getting further authorization from you, but I just wanted to give you a heads up that we are getting some pushback on that reorganization proposal. Additionally, on the good news front, since your last meeting the department of regulatory agencies issued all their sunset reports, one of which relates to the motor vehicle dealer board which is in article 6 of title 12. That's again one of those that we were going to move to title 44, which we still plan to do, but that was also one where the department was looking for some reorganization and consolidation of some duplicative parts in that article. As it happens, the sunset report is recommending doing some recodification of that article so if the sunset bill proceeds with that recommendation in it we won't have that work to do because it will be handled through the sunset process.

11:36 a.m. – The Committee addressed agenda item 5 – Non-rule Directives by Executive Branch Agencies.

Representative Willett said I appreciate this being put on the agenda. I'm really looking for advice. I got some already from the Office, but maybe some more discussion and from some of the more senior members here would help. What prompted this was that I had a couple of constituent requests. One was on a form used by an agency that the constituents feel is not consistent with statutory law and then the other was on a typical out-of-cycle regulation or interpretation of regulation that a different constituent thought was not consistent with statutory law. As I understand it on the second issue first, on out-of-cycle matters like those that have been taken up, we've done some recently, and I understand that that's up to the chair's discretion. I'm going to do some more research on that issue and I've asked for some legal input from the lawyer from that trade organization on that particular matter. If that lawyer gets back to me and they want to pursue it and I think it's legitimate do I just contact the chair and permission to get it on a future agenda? That's probably a pretty normal issue that comes up from time to time. The other one is more complex and perhaps more problematic. I had an occasion a year or two ago where an agency just issued a letter and made an interpretation and a constituent came to me and it was kind of a legislative matter. There's some law out there that says that that kind of action, depending on how it's done, can have the effect of rulemaking or regulation making and if looks like a duck and quacks like a duck and if it doesn't comply then it can be stricken. That particular constituent was successful on challenging that letter and interpretation. Well more recently an agency came up with a form, not a rule or regulation, and sends this form to constituents and they are going to meet with me on this particular issue. The question is what if an executive branch does a form that has the effect of law and puts constituents in a real jam that might be inconsistent with the statute? My understanding is we may not have the authority in this Committee to deal with that because we, by our charge, charter, whatever it is, might be relegated

and limited to rules and regulations and review thereof. If that's the fact I don't know why we wouldn't want to expand the authority of this Committee to be able to deal with forms because I think we're the backstop on bureaucracies and the executive branch and we owe that to our constituents. Those are my basic questions and I'm just looking for input.

Senator Steadman said not really having any context by which to understand the inquiry I'm a little hesitant to see this Committee inject itself into the review of every agency form. That starts us down a pretty tedious and long path in my mind. But I'd love to know where is this form that someone thinks has the force of law or contravenes statute. Is this a Kim Davis marriage license thing we're talking about or can you give me some context?

Representative Willett said I haven't come prepared to talk in detail but it is more with vaccinations. We heard some legislation last year about vaccinations and information gathering from the schools and there's now a new form that's come out that holistic health providers think is inconsistent with the law so that's how it's come up. I'm not here to inject that because we're not ready, but that's how it came up. It would be a form that an agency comes up with either after, in this case, failed legislation they might have been supporting or whatever reason they want to do by form that which might be not fairly contemplated and maybe the statute doesn't even reference a form they just come up with one.

Representative Foote said to answer your first question about the rule review my understanding is that any member can request a rule review, staff would do it, and the chair is notified that it's being done, but after the rule review is done then the chair decides whether or not it goes on the agenda for the Committee.

Representative Willett said so do I understand I would present that to the Office for review, they inform you that it's being done, and then presumably they tell me their opinion if they think it's okay or not and then if it's not the chair would decide whether or not to put it on this Committee's agenda? Ms. Haskins said yes, that's correct. Representative Willett said but I would like to know, apart from the specific issue on the form, is it true that this Committee has no authority over form making? What is this Committee's power?

Representative Foote said I'll take a stab at it and other members that have been here longer than me might be able to add on, but I can't say I have any experience in reviewing forms since I've been on this Committee. Perhaps the question's not been presented. Perhaps it's just not part of our Committee. But I just know that in four years I haven't gone through that. There are others that have been on this Committee longer that might be able to add to that.

Senator Steadman said I've never seen us review a form and the statute gives this Committee its charge. What's running through my mind is what is the remedy for the person who believes that they're being required to complete a form that doesn't afford them the correct statutory opportunities? I don't know if this is about compliance or opting out or whatever, but if statute gives you a right or an option that the form fails to present, what is the remedy for the person in that instance? I would assume it's somehow to hopefully work with the agency to show them that they have the right to check this box but the agency didn't include the box on their form. And if the agency's unwilling to afford them the opportunity the statute offers them, then I would think a legal action would be that person's remedy. That seems rather extreme to tell somebody to go file suit over the form they don't like, but I think that's the proper remedy, certainly before enlarging the role of this Committee.

Representative Willett said thanks for that input. One more subtlety, and I might ask legal staff, but I think I was told by somebody that if a regulation refers to a form, let's say it's a new regulation flowing from a new statute and they promulgate a form that is referenced by the regulation that we could look at that. It seems to be because that would be part of the rule or regulation we are charged with deciding whether to sunset or not on an in sequence review. It seems to me odd that if we can look at a form in that context simply because it's referenced in the new rule or regulation that it would be awkward if they could come up with one bespoke without any reference and no one has the authority to look at that other than civil remedy. Ms. Haskins said we have had some instances where a rule comes before the Committee or its staff and the agency is referring to guidelines that haven't gone through the Administrative Procedures Act or perhaps a form that is not part of the rule. We have on occasion brought to the Committee the fact that this agency has done something that should have gone through the process and so we have sometimes brought that kind of an issue to the Committee and asked the Committee to consider not extending the rule that refers to that outside document that we think meets the definition of a rule. What we're looking at is the document that the agency has done, is it a nonbinding interpretive rule under the definition of the Administrative Procedures Act or is it a rule. The Committee has on occasion voted not to extend a rule that refers to some outside document, but that's the very limited extent of the Committee's ability, through the rule review process, to address that issue and I would say that I think the Committee does not have authority currently to look at forms. But we do occasionally get the question of has something the agency's done, does it rise to the level of being a rule? But the remedy for this Committee is to act on rules that have been properly adopted before the Committee so that's where if there's nothing for us to bring to the Committee to ask you to vote on there's nothing for us to put in the Rule Review Bill. That's where your ability to act is limited.

Representative Foote said it looks like Representative Willett has some food for thought.

11:50 a.m.

The Committee adjourned.